UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 21126 and
MERCHANT MARINER'S DOCUMENT NO. Z-571-56-3269
Issued to: J.B. RODIECK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2122

J.B. RODIECK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 24 November 1976, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seamans's documents for 3 months on 12 months' probation upon finding him guilty of misconduct after hearing held at Tampa, Florida. The specifications found proved allege that while serving as operator on board M/T ADMIRAL LEFFLER under authority of the documents above captioned, on or about 26 November 1975, Appellant:

(1) wrongfully required [sic.] an unlicensed person to relieve him from his wheel watch and control the tug for approximately ten minutes while he left the bridge.

(2) wrongfully failed to maintain a proper lookout, this failure contributing to the collision between the towed barge CECO 2501 and the motorboat FL-6138-BU with the loss of three lives.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence eight exhibits and the testimony of one witness.

In defense, Appellant offered in evidence two exhibits and his own testimony.

After the hearing, the Administrative Law Judge concluded that the charge and two specifications had been proved. He then served a written order on Appellant suspending all documents issued to him for a period of 3 months on 12 months' probation.

The entire decision was served on 4 December 1976. Appeal was

timely filed and perfected on 3 June 1977.

FINDINGS OF FACT

On 26 November 1975, Appellant was serving as an operator on board the United States M/T ADMIRAL LEFFLER and acting under authority of his license while the ship was at sea. ADMIRAL LEFFLER is a 79 foot 9 inch, uninspected, 149 gross ton, ocean going tug. On that day ADMIRAL LEFFLER was off the west coast of Florida engaged in towing the 230 foot oil barge, CECO 2501, on a 100 foot hawser from Crystal River to Port Manatee, Florida. The weather in the Gulf of Mexico was clear with the wind gushing 10 to 15 miles an hour and the seas running three to four feet with whitecaps. Visibility was unlimited except for a strong glare from the water which hampered vision from directly ahead of the tug to a few degrees on the starboard bow. ADMIRAL LEFFLER carries a six man crew. The captain and Appellant were the only members licensed as operators by the Coast Guard.

The captain had navigated the vessel out of Crystal River Florida, and worked his limit of 12 hours for the 24 hour period set by 46 U.S.C. 405(b). At 0700 the captain was therefore relieved from his watch by Appellant and went to his quarters to sleep. AT 0900 Appellant was joined at the wheelhouse by Frederick, a seaman on the tug. Frederick had just awakened and as was his habit went to the wheelhouse to see whether Appellant needed him to perform any duties. Appellant replied affirmatively and told Frederick that he would like him to take over his watch for a few minutes so that he could go to the head. Frederick had been master of a 73 foot shrimp boat that ran between Tampa, Florida, and South America for 10 years prior to his employment on ADMIRAL LEFFLER, and therefore Appellant and the captain often permitted Frederick to take over the watch for a few minutes during clear weather so that they could leave the wheelhouse for a short period of time.

Before leaving the wheelhouse, Appellant informed Frederick of the course, speed, and weather, and checked the radar. The radar had a range of 24 miles and did not indicate any vessels in the area. The speed of the tug was eight knots. After 5 to 10 minutes at the wheel Frederick spotted a 20 to 21 foot white, fiberglass, motor-powered small craft about 15 degrees on his starboard bow approximately 50 yards away. The craft was headed due east and as it was on the starboard side of the southward bound ADMIRAL LEFFLER, had its bow pointed just ahead of the tug at right angles to the projected track. Frederick could not see any wake but the craft nevertheless closed in on the starboard side of ADMIRAL LEFFLER as the tug proceeded ahead. When the craft was on the

tug's starboard quarter Frederick turned the tug 15 degrees to the left to avoid a collision between the boat and the tow. Frederick could not make a sharper turn for fear that the tug would be capsized by the barge which it was towing. Appellant was returning to the wheelhouse and saw the motorboat just as Frederick began his turn. Appellant proceeded to the wheelhouse, ordered the engines stopped, and blew blasts on the air horn. Meanwhile, the motorboat had moved between ADMIRAL LEFFLER and the barge, collided with the starboard bow of the barge, and disappeared. The captain came up and went to the wheelhouse after hearing the air horn, and ordered ADMIRAL LEFFLER turned around to assist the motorboat. However, ADMIRAL LEFFLER was only able to recover the dead bodies of two of the persons who had been aboard the motorboat while that of a third person was lost.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) The Judge committed error in relation to certain findings of fact.

(2) Decision on Appeal NO. 2058 is controlling in this case on the issue of whether Appellant had improperly tendered control of the vessel to an unlicensed person, and dictates a different result.

(3) The Judge erred in concluding that there was not a proper lookout and that failure to maintain a proper lookout contributed to the collision between the towed barge and the motorboat.

APPEARANCE: At the hearing, Holland & Knight of Tampa, Florida, by Mr. Paul D. Hardy, Esq. On appeal, Fowler, White, Gillen, Boggs, Villareal and Banker, by Nathaniel G.A.W. Pieper, Esq.

OPINION

I

There are several items that need clarification before the grounds for appeal are discussed in detail.

One involves the wording of the first specification as found proved. It has been quoted in pertinent part above where the charges are summed up. The word "require" was used in the allegation, and was found proved, in characterization of the action

of Appellant with respect to the "relief" by an unlicensed person. The word is inappropriate to the proceeding, both as applied to the misconduct alleged and as to the facts established by the evidence. What constitutes the offense here is not a "requiring" but at best a "permitting." The entire consideration given at hearing was not to an imposition of a duty upon another but to an improper permitting of another to act in a responsible capacity. I have no hesitancy in determining, especially in the absence of objection either at hearing or on appeal, that what Appellant had notice of as the substance of this complaint, what was in fact litigated, and what was in fact found established, was that he permitted or allowed another to perform a function which was, as alleged, his own duty to undertake, not that he "required" anything of anyone.

The second matter also involves the language of that specification. In declaring that Appellant had required ("permitted") an unlicensed person "to relieve [him] at the wheel watch and control the tug," and linking this coupling of activities to a further uncharacterized "absence from the wheelhouse," the specification barely, and only implicitly, alleges an offense. If it is read to equate "wheel watch" to "control of the vessel" there is obviously a defense. If it is read to equate "presence in the wheelhouse" to "control of the vessel" (and, "absence from the wheelhouse" to "abandonment of control" of the vessel) it is also a misstatement. The offense, if one is to be alleged and found, is predicated on the terms of and within the intent of the controlling statute.

The statute (R.S. 4427) prohibits operation of an uninspected towboat except under the "direction and control" of a properly licensed person. The specification here correctly alleged that Appellant was a person properly licensed to perform the functions involved and was serving in a capacity which placed on him the responsibility to discharge the attendant duties. A pertinent fault can then immediately be seen to lie in an abdication of the responsibility and in a permitting of the vessel to the operated under the direction and control of an unqualified person (i.e., to be operated "not under the direction and control" of a properly authorized person). Under such a statement an offense is alleged, and the specific fact circumstances (who was at the wheel? where was the licensed operator? What was he doing?) are the basis for judgment as to the identity of the person who was in fact directing and controlling the operation of the towing vessel.

I read the specification as fairly alleging that Appellant, having for the time being the responsibilities of a towboat operator under the statutes, permitted the operation of the tow under the direction and control of a person not qualified for the service under the statute. As originally preferred the charges had

made specific reference to R.S. 4427, but an amendment to characterize the allegations as exclusively "misconduct" resulted in elimination of the reference. The specification had in fact alleged that conduct made improper by the statute was involved, and this is the theory on which the case was litigated and heard. See Kuhn v Civil Aeronautics Baord, CA D.C., 183 F. 2nd 839.

The third preliminary consideration deals with the allegation of connection of an act of misconduct with a fatal collision. The connection is asserted for the specification which alleged a failure to maintain a proper lookout but not in connection with the allowing of the tow to be operated in contravention of the statute. The matter is noted here, for purposes of dealing with the overall questions of notice and actual litigation; the significance, such as it is, will be discussed later.

II

Certain specific errors in the decision are complained of and they are noted and disposed of here before reaching the two broad issues raised by Appellant.

Appellant first urges the point that the Administrative Law Judge's finding (D-8) that Frederick was alone in the wheelhouse for "at least ten minutes"f has no support in the record.

In point of fact the finding of the time question is somewhat unsatisfactory. Frederick testified that Appellant was absent from the wheelhouse for "five to ten minutes." Appellant's entry in the log of the vessel records the time of his "relief" by Frederick as "0920." Records in evidence place the time of collision at "0930." The Administrative Law Judge granted a proposal by Appellant for a finding that Frederick arrived at the wheelhouse "at approximately 0930..." In his "ultimate" finding, couched in the language of the specification, he places the "requirement" for relief at "about 0930," and in "evidentiary" findings states only that the "relief" occurred "A short while prior to the collision..." No finding as to the time of collision was made at all.

There appears to be no basis for the "at least" in the finding complained of; "at most" or "about" is supportable as fitting the evidence presented. The precise time or the precise duration of an interval are not of the essence here. The time is a factor, but it is only one of several that can contribute to the formation of a judgment as to the nature of the "direction and control" of the vessel, the one true issue raised by the specification. The time element will be discussed in its proper place.

Similarly, Appellant quarrels with a finding that he did not

know what took place in the wheelhouse (since his personal knowledge is a matter of his own cognition and he did not testify), but that he was apprized by Frederick after the collision that Frederick had not seen the other vessel until "too late" (since Frederick did not testify to any conversation at this hearing). Appellant's lack of knowledge of events in the wheelhouse is inferable, in the absence of any testimony to the contrary from him, from his very absence from the wheelhouse for the period in question. The knowledge supposedly gleaned from Frederick may have been imputed to Appellant by the Administrative Law Judge from matter of record in another hearing; if so, it is an imperfection, but it is of no importance whatsoever. The question of when or whether Appellant was ever apprized of the closeness of the other vessel on first sighting is irrelevant.

On one point a correction urged by Appellant is of some significance. The Administrative Law Judge found that Frederick volunteered to relieve Appellant at the wheel "for a coffee break." Appellant insists that "there is no such testimony." The evidence is clearly to the effect that there was no reference to a "coffee break;" there is no doubt that Appellant left the wheelhouse for the purpose of going "to the head." This precision does not operate to Appellant's advantage.

III

On the merits of the "direction and control" question, Appellant urges that language in Decision on Appeal No. 2058 fits his case precisely and necessitates dismissal of the pertinent specification here.

In that case, a licensed towboat operator entrusted the wheel to a deckhand while the operator went to the head. The decision acknowledged that "direction and control" of the vessel under the statute was not directly linked to taking the wheel, or presence in the wheelhouse, or any one solitary test. It was explained that permitting another to take the wheel for training purposes under favorable conditions was not intrinsically an abandonment of direction and control to another. The decision went on to cumulate factors present in that case which added up to a relinquishment of direction and control. Among the factors were absence of the party from the wheelhouse, a failure to inform the deckhand of the course and speed of the vessel, an obstruction to vision in a certain sectro caused by the light condition of a barge alongside and so forth. Appellant urges that this decision means that an absence from the wheelhouse of a towboat by a licensed operator who leaves an unlicensed operator at the wheel is not improper unless the weather is bad, the proper information is not imparted to the "relief," or the vision of the man at the wheel is restricted.

The Administrative Law Judge here has read the decision in much the same way, saying; after quoting four sentences from it: "The above statement of the Commandant would excuse Mr. Rodieck's leaving the wheelhouse except for the proviso that the visibility should be good." The glare-sector in this case was then likened to the interference to vision in the case of No. 2258 caused by the light barge alongside the wheelhouse of the towboat. Selecting this one factor from the earlier case and adding it to "absence from the wheelhouse," the Administrative Law Judge mechanically constructed a "rule" within which Appellant was trapped.

Reflection on this attempt to reduce general comment, actually a side-note to dictum, to a rule reveals a fundamental misunderstanding. The question of visibility as such, whether framed in terms of fay of night, uninterrupted arc or obscured sectors, or natural or artificial barriers, has nothing to do with the question of who is in direction and control of a towing vessel. In case in which the sole issue is, say, the qualification of the person at the wheel of a vessel, if such a matter is an issue, the fact that there is a blind sector caused by a physical obstruction to sight in one certain direction has no bearing upon the identity and qualification of the person involved. If there is a bar to vision, it exists whether the man at the wheel be an able bodied seaman (as required under some conditions) or an ordinarily seaman, a licensed operator or an unlicensed deckhand. It may have a bearing upon adequacy of a lookout, when that is the issue, not upon the identity or qualification of the person designated to perform lookout duties.

The decision of the Administrative Law Judge and the appeal therefrom both have strained the meaning of the language from No. 2058, which is repeated here:

> The temporary absence from the wheelhouse of the licensed operator (officer of the watch) on an uninspected towing vessel is not, in every case, an absolute violation of 46 USC 405(b) (2), as this absence does not necessarily constitute relinquishment of "actual direction and control" over the vessel. If the circumstances are such that an unlicensed crew member can temporally steer the vessel, without any appreciable increase in risk to its safe navigation then the licensed operator may momentarily leave the wheelhouse (after giving appropriate instructions to the crewman) and still maintain "actual direction and control". Thus, in a situation where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the proven navigational competence of the cremember is high, the licensed operator might briefly leave the wheelhouse

and still maintain actual control of the vessel.

It will be seen immediately that this language is not exculpatory of the appellant in that case, and it is intended only to indicate that there are conditions, not present there, under which a mere absence from the wheelhouse of a towboat would not ipso facto justify an inference of relinquishment of dilection and control. First the absence is spoken of as "temporary;" then appears the phrase "momentarily leave." The reference to the factors upon which Appellant predicates his whole appeal on this issue, and upon which the Administrative Law Judge too narrowly focused, the factors of straight course, good visibility, and sparseness of traffic, are spoken of only in conjunction with permitting an unlicensed person to handle the wheel "for training purposes." This step in the examples given does not even contemplate certain conceivable (and very much in point) types of absence from the wheelhouse and very definitely is concerned with a form of supervision by the proper party since the activity discussed is a form of training. More to be feared as an inference from this language than the meanings ascribed by Appellant and the Administrative Law Judge is the thought that a licensed operator could not permit a trainee to take the wheel even in his presence if a change in heading was in prospect or if the visibility was such that the licensed operator preferred to free himself to act as a primary lookout and issue orders to a subordinate at the wheel.

The mistake is to substitute easy phrasing for statutory language and to construe them as cognates. No one factor, nor denumerable set of factors, necessarily defines the whole. The elements such as "Who was at the wheel?," "Was the operator in the wheelhouse?," "What was the makeup of the tow?," "What was the weather?" do not individually determine "direction and control," nor does any predetermined number of factors necessarily establish compliance with the law. A pragmatic approach to the question must go with the reading of the law. By the same token, some one element, in and of itself, may serve to negative a whole array of accidental aspects of "direction and control."

There should be no mistake as to the range of tests and circumstances that open to the view as the circumstances change. For example, the absence of a master from the wheelhouse of an ocean-going vessel descending the river from New Orleans to the Gulf of Mexico, whether he be in the head or resting in a seacabin, may well be faultless when there are a local pilot and a licensed mate in active supervision of the vessel's navigation, but possibly otherwise if an alert to the unusual has already been given. The range of possibilities is broad, however, moving across from a concept of negligence tested by the common prudent practice of peers to a statutory mandate which, however much light is needed

for its ascertainment, sets up a definite limit to acceptable conduct beyond which there must be found a violation of the statute.

Whatever may be passable, or allowable, or tolerable, as exercising "direction and control" of a tow, it cannot be said, when a tow is navigated with the sole statutory qualified person below deck in an enclosed compartment, whether he be asleep or using toilet facilities, that he is in direction and control of the towing vessel at the time. This would be true no matter how many, if any, other unlicensed persons were up and about and on deck, doing whatever. There were in fact two licensed operators aboard ADMIRAL LEFFLER on this occasion. The one who was, at the time, in the head, was no more directing and controlling the operator of the vessel than was the one who was asleep in his quarters; the only difference was that one was charged with the immediate responsibilities of the person on duty while the other was not.

The length of time of absence "from the wheelhouse" then is not only of itself controlling, it is in some instances not even a consideration when the other end of the line - "Where was person during the absence?" renders the duration of no significance.

IV

As to the specification dealing with the failure to maintain an adequate lookout, I think that a specific analysis is not necessary.Two arrays of court decisions have been presented, of course: those dealing negatively with the matter, to the effect that the lookout must be in the best position possible and must be unhampered by other duties, against those recognizing that a vessel may well be adequately manned and operated in compliance with the rules of the road when only, in some instances one person is aboard. However, in my view of this case, resolution of the problem of maintaining a lookout is moot.

One of the duties of a person in direction and control of a vessel is to see to it that proper lookout is maintained, if for no other reason than to assure that the operator himself is receiving the information necessary for his actions. A person who has relinquished direction and control has implicitly abandoned his responsibility toward lookout maintenance. After the abdication, if a good lookout were maintained it would simply be the good luck of the abdicator; the failure of a lookout is a mere consequence of the greater dereliction.

I do not mean that the formulation and the trial of the issue were redundancies; I mean only that when the broader and graver matter is resolved adversely to the party there is no point in

belaboring as separate offenses matters which are subsumable to the general issue. I do however find that the collision, which was initially alleged only in connection with the lookout complaint, is a fact to be considered in connection with the general fault of permitting the improper operation of the vessel, and the dismissal of the lookout specification to be ordered does not imply the negation of the finding as to the collision.

One last comment is appropriate here because the Appellant's complaint, which is resolvable independently, might if left unresolved be thought to undermine the essential propriety of the proceeding. Appellant noted that this same Administrative Law Judge, in a suspension and revocation proceeding involving the document of the witness-wheelsman Frederick, stated:"...there was no evidence that Frederick wrongfully failed to properly perform his duties as lookout." It is therefore mystifying, says Appellant, how in his case, involving the same set of facts, it could be found that Appellant had "failed to maintain a proper lookout." It could be, of course, that Frederick did not fail to perform duties as a lookout for the reason that he had not been assigned as lookout and thus had no duty to perform, and that this fact alone, the failure to station him as lookout, constituted Appellant's separate offense. It is better, however, to recall the general rule that in different proceedings, with different parties and different records of evidence, apparently inconsistent findings may be made with validity in both cases.

ORDER

The findings made by the Administrative Law Judge in this case are MODIFIED by substituting the word "permitted" for the word "required" in his "ultimate finding" numbered "one," and by setting aside his "ultimate finding" numbered "two." The findings made above herein are substituted for the "evidentiary findings" entered in his decision. His conclusion that the first specification and the charge were proved is AFFIRMED, his conclusion as to the second specification is SET ASIDE and the specification is DISMISSED. The order, entered at New Orleans, Louisiana, on 24 November 1976, is AFFIRMED.

R.H. Scarborough
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 15th day of June 1978.

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